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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-319

TERESA NATALE MARSHALL and
JAMES LEE VERDON, Petitioners,

v.

CITY OF SEATTLE, Respondent.

REPLY BRIEF OF PETITIONERS

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CITATIONS

Cases: Page

Baggett v. Bullitt, 377 U.S. 360 (1964) 2
Beecher v. Alabama, 389 U.S. 35 (1967) 2
California v. LaRue, 409 U.S. 109 (1973) 3
Miller v. California, 413 U.S. 15 (1973) 4
Paris Adult Theater I. v. Slaton, 413 U.S. 49 (1973) 4
Southeastern Promotions, Ltd. v. Conrad, ___ U.S. ___ (1974). 5
United Airlines v. Mahin, 410 U.S. 632 (1973) 2
United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973) 4
United States v. Orito, 413 U.S. 139 (1973) 4

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I.

Respondent contends that petitioners' first question presented, to-wit:

> "1. Is it constitutional under the First and Fourteenth Amendments for a state to apply a criminal ordinance prohibiting nudity in public to a performance on a stage in a theatre?"

is not reviewable by this Court because "the state court judgment is based on a non-federal ground of ordinance construction" (Resp. Br. 6).

Petitioners do not contend that this Court has jurisdiction to review the construction of the ordinance given by the Court below. This Court will accept the construction of state law given by the Court below, but that is no answer to the question presented, which is a federal constitutional question of whether that law, as so construed, is violative of the First and Fourteenth Amendments. See, *e.g., Baggett v. Bullitt*, 377 U.S. 360 (1964).

Only if the decision of the Court below rests upon an adequate state law basis, independent of the federal constitutional question, will this Court deny review of the federal constitutional question. See *United Airlines v. Mahin*, 410 U.S. 632 (1973); *Beecher v. Alabama*, 389 U.S. 35 (1967).

Respondent also cites the rule that if a state law is admitted to be valid and the only question is whether it has been constitutionally construed this Court lacks jurisdiction to review (Resp. Br. 6). This rule is inapplicable. Petitioners do not admit that the ordinance, *as construed and applied by the court below*, is valid. The law could have been construed to be valid by limiting

its applicability so as not to apply to performances on the stage in a theatre. The Court below rejected that potential construction.

Nor is the only question whether the ordinance has been correctly construed. That is not a question for this Court. The question is whether, as construed, the ordinance is constitutional; or, if the opinion of the Court below construed the ordinance as an obscenity ordinance, whether the performances could constitutionally be considered as obscene, and whether petitioners were denied due process because they were not tried for obscenity.

II.

Respondent contends that petitioners' second question presented, to-wit:

> "2. Does a finding by a state court that a burlesque strip-tease dance is obscene violate the First and Fourteenth Amendments?"

while presenting a substantive federal question, is a question which was decided by the Court below in accordance with applicable decisions of this Court (Resp. Br. 7-9). Respondent cites and relies on this Court's comments in *California v. LaRue*, 409 U.S. 109 (1973);

conclusion by that Court that the subject performances were obscene when petitioners had never been charged with or tried for violating an obscenity law?"

fails to state a proper ground for review by this Court, because it is based on ordinance construction, which is not a federal constitutional question.

This argument is specious. Petitioners' third contention is that they were denied due process by the application of this new construction of the ordinance to affirm the convictions when petitioners were not charged with nor tried for violating an obscenity law. The Court below equated "lewd" with "obscene." Petitioners were not even charged under the "lewd" provision of the ordinance but were charged with exposing private parts to public view.

IV.

This Court has granted certiorari in No. 73-1004, *Southeastern Promotions, Ltd. v. Conrad*, ___ U.S. ___, 39 L. Ed. 2d 466 (1974). That case apparently involves, *inter alia*, the obscenity vel non of the theatrical production "Hair," and certainly involves nudity on the stage in a theatre.

The decision in that case may answer some of the open questions regarding

live nudity in the theatre. The difference in the type of theatre involved (a nationally acclaimed and successful musicial v. burlesque) makes it very appropriate to consider this case as a companion to that case.

Petitioners respectfully submit review should be granted.

Respectfully submitted,

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